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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

JACKIE THOMPSON et al.,

Plaintiffs and Appellants,

v.

C.L. KNOX, INC.,

Defendant and Respondent.

F077511

(Super. Ct. No. S-1500-CV-278751)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. David R. Lampe, Judge.

Gaines & Gaines, Alex Paul Katofsky, Miriam Leigh Schimmel; Kabateck Brown Kellner, Kabateck, Brian S. Kabateck, and Christopher B. Noyes for Plaintiffs and Appellants.

Muzi & Associates, Andrew C. Muzi and Nida L. Henderson; Hagan Law Group and Joseph A. Werner for Defendant and Respondent.

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This is an appeal from an April 18, 2018 judgment of the Kern County Superior Court entered on an order granting summary judgment in favor of defendant C.L. Knox, Inc., doing business as Advanced Industrial Services ("AIS"). For the reasons set forth below, we affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

I. AIS[1]

AIS is a Bakersfield-based tank cleaning and services company. Its personnel consists of approximately 110 to 120 employees, 90 percent of whom work in the field and perform the following principal activities: oil tank and vessel cleaning, hydro excavation, high pressure water blasting, industrial painting and coating, and specialty material vacuuming. On occasion, the company receives temporary employees from local temporary staffing agencies.

AIS held safety meetings at its office every Thursday until February 5, 2015, and on the first Thursday of each month thereafter.[2] They began at 5:15 a.m. and typically lasted between 20 minutes and an hour.

II. The class action

Three separate lawsuits were consolidated into a single class action. The operative complaint defined the class as "[a]ll individuals who (1) work or have worked for [AIS] as a non-exempt employee and all individuals who work or have worked for Continental Labor Resources, Inc. [(Continental)[3]] [and were] placed at [AIS] as a non-exempt employee and (2) who attended one or more safety meetings between February 25, 2009

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1 The facts under this heading are taken from the parties' separate statements of undisputed facts. (See Code Civ. Proc., § 437c, subd. (b)(1) & (3).)

2 In its appellate brief, AIS points out it stopped having these meetings sometime after it moved for summary judgment.

3 Continental, a temporary staffing agency, was named as a defendant in at least one of the original lawsuits. A settlement was reached prior to consolidation.

and the present." Plaintiffs Kevin Fritz, George Montoya, Jackie Thompson, Keith Aurthur, and Manuel Macias were appointed as the class representatives.[4]

In the operative complaint, plaintiffs alleged AIS violated Labor Code sections 510, 1194, 1194.2, and 1198. They specified:

> "32. During the liability period, [AIS] failed to pay Plaintiffs and members of the Class all minimum wages and overtime wages. Once every week for the entire Class Period (usually Thursday mornings at 5:00 a.m.), [AIS] held a mandatory safety meeting at its Bakersfield headquarters. The base rate for these safety meetings was the minimum wage. However, [AIS] did not properly pay overtime . . . to those employees who attended safety meetings. For example, if an employee attended the safety meeting (one hour for $8) then worked for eight hours on a job site (eight hours at their regular hourly rate, typically far greater than $8), the overtime hour was paid on the safety meeting's lower $8 rate, not on the weighted average of all hours worked, as required by California law. This is a uniform companywide policy which results in substantial underpaid overtime.
>
> "33. In addition, following the one-hour safety meetings on Thursday mornings, Class member-comprised work crews went to their [AIS]-owned crew trucks (or their own cars or trucks) and drove (or rode) to the off-site job locations, and then returned back at the end of the work day. Those who were passengers (rather than drivers) in [AIS]-owned vehicles, and those who drove themselves to the off-site locations using their personal vehicles, were never paid for the travel time to the offsite location. Plaintiffs allege that this travel time to the job site location after the mandatory safety meetings must be compensated. . . ."

Plaintiffs also alleged AIS furnished inaccurate wage statements (see Lab. Code, § 226, subds. (a), (e)); failed to promptly pay wages to former employees (see *id.*, §§ 201-203); engaged in unfair competition (see Bus. & Prof. Code, § 17200 et seq.); and was subject to civil penalties under the Labor Code Private Attorneys General Act of 2004 (see Lab. Code, § 2699, subd. (f)).

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[4] We refer to plaintiffs collectively as "plaintiffs" and an individual plaintiff by his or her surname to avoid confusion. No disrespect is intended.

III. The summary judgment proceeding

a. *AIS's motion*

On October 26, 2017, AIS filed a motion for summary judgment or, in the alternative, summary adjudication. It argued:

> "AIS is entitled to judgment as a matter of law on the [claim] for [f]ailure to [p]ay [a]ll [w]ages because . . . travel time from AIS'[s] [office] to employees' job sites following Thursday morning meetings at AIS'[s] [office] was not compensable time for non-driver employees; employees did not go 'off the clock' during their drive time following Thursday morning meetings; and AIS overpaid overtime compensation to its employees."

Furthermore, AIS asserted it "is entitled to judgment in its favor on" the remaining causes of action because they " 'piggy back' off of Plaintiffs' unpaid wage claim[]," which "has no merit."

In support of its motion, AIS presented the following evidence:

i. Deposition testimony

Leslie Knox, AIS's president, was deposed on April 14, 2015. The transcript of the deposition read in part:

> "Q. Now, there's mandatory training sessions that [AIS] has for its employees; correct?
>
> "A. Mandatory training sessions?
>
> "Q. Right. I think I heard – in the morning I heard that it was on Thursday.
>
> "A. Those aren't training sessions.
>
> "Q. What do you call them?
>
> "A. Safety meetings.
>
> "Q. Are they mandatory meetings?
>
> "A. No.

"Q. Do employees have to attend?

"A. No.

"Q. They are voluntary?

"A. Yes.

"Q. A hundred percent?

"A. Yes. [¶] . . . [¶]

"Q. Are temporary employees required to attend the Thursday morning safety meetings?

"A. Nobody is required. I mean, they can show up, yes. [¶] . . . [¶]

"Q. Why not make those meetings mandatory?

"A. Because they don't need to be mandatory. They are every day in the field."

ii. Declarations

1. *Knox*

In a declaration dated October 25, 2017, Knox attested:

"7. Up until February 5, 2015, every Thursday, AIS held weekly safety meetings at its office . . . in Bakersfield. After February 5, 2015 and continuing through to the present, the meetings have been held on the first Thursday of every month. The meetings have never been mandatory. Because the meetings are not mandatory, not all employees attend them. Further, because the meetings are not mandatory, employees are not reprimanded or otherwise disciplined for not attending them. . . . The declarations of [11] employees show that the Thursday morning safety meetings are not mandatory, that not all employees attend them, that employees are not reprimanded or disciplined for not attending them, and that employees are paid continuously from the start of the meetings to the end of their workday.

"8. At the Thursday morning safety meetings, employees participate in and share their thoughts about their jobs and safety. Employees ask questions, crews are recognized, and hats and t-shirts are passed out. Even though the meetings are not mandatory and no work is

performed at them, AIS pays employees to attend. The rate that AIS pays employees to attend the non-mandatory meetings is the applicable minimum wage. [¶] . . . [¶]

"10. Nearly every week, employees work overtime hours. . . . [R]ecords show that Fritz and Macias accrued overtime hours nearly every week and that the vast majority of their overtime compensation in any given week was calculated and paid at the legal overtime rate based on their normal, regular wage rate rather than the minimum wage.

"11. Aurthur was only employed by AIS for a 12-day period. As such, AIS issued him only two paychecks and wage statements. Prior to that, all of Aurthur's paychecks and wage statements were issued by Continental . . . . Thompson was employed only by Continental . . . ; he never became an AIS employee. As such, none of his paychecks and/or wage statements were issued by AIS. . . . Montoya was only a Work Force Staffing[5] employee, so his paychecks and wage statements came only from Work Force Staffing and not from AIS. . . .

"12. For the convenience of employees, AIS provides them the opportunity to park their cars at its office . . . and to be driven to their job sites in AIS'[s] trucks. This transportation is optional, and employees are free to travel to job sites using other transportation of their own choosing. While most employees avail themselves of this option, many do not and, instead choose to drive themselves directly to their job sites for the day. [¶] . . . [¶]

"14. Employees who ride in the trucks as passengers or who transport themselves to the job sites are generally not paid for their travel time from the [office] to job sites; however, on Thursdays, following the non-mandatory meetings, as a practical matter, they do not go 'off the clock,' i.e., they are continually on the clock from the time of the beginning of the non-mandatory meeting until the end of their workday, including during their travel time. They are therefore paid for their travel time on Thursdays."

2. *Melvin Hale*

In a declaration dated October 7, 2015, Hale attested:

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5 Work Force Staffing is a temporary staffing agency.

"1. I have worked as a Driver, Safety Tech, and Project Manager at [AIS]. My statements below are within my personal knowledge and, if called as a witness, I could and would competently swear to them.

"2. I have been employed by AIS for approximately six (6) years.

"3. I am paid by AIS on an hourly basis.

"4. The Thursday Morning Safety Meetings at AIS are optional. If an employee misses a Thursday Morning Safety Meeting, nothing happens to that employee.

"5. Everyone is welcome to attend the Thursday Morning Safety Meetings. I usually try and attend the Thursday Morning Safety Meetings. When I do attend those meetings, I am paid at the flat rate when attending the Thursday Morning Safety Meetings.

"6. The Thursday Morning Safety Meetings usually start at 5:10 am. There is a sign in sheet at these meetings so that AIS can pay those who attend the meeting. I get paid from the time I attend the Thursday Morning Safety Meeting until I complete my work for the day. I do not go 'off the clock' after the Safety Meetings.

"7. I usually work about 5 hours overtime per week, paid at my regular rate. I believe that AIS pays me accurately for my overtime hours. I have never come up short."

3. *Chris Uresti*

In a declaration dated October 7, 2015, Uresti attested:

"1. I am a Person Leading Work . . . – Crew Supervisor for [AIS]. The statements set forth herein are within my personal knowledge and, if called as a witness, I could and would competently swear to them.

"2. I have been employed by AIS for 4-5 years. I am an hourly employee.

"3. I usually attend 80-90% of the Thursday Morning Safety Meetings. These meetings are optional.

"4. I have never been penalized or disciplined for missing a Thursday Morning Safety Meeting. I don't get paid for the meeting if I don't attend.

"5. I sign in on a sign in sheet when I attend the Thursday Morning Safety Meetings so I can get paid for attending.

"6. I get paid the minimum wage rate for attending the Thursday Morning Safety Meeting.

"7. The Thursday Morning Safety Meetings usually start at 5:15 am and at every meeting, different topics are discussed.

"8. I am paid continuously from the time I attend the Thursday Morning Safety Meeting until I complete my work for the day. I do not go 'off the clock' after these safety meetings.

"9. I work more overtime hours at my regular wage rate than at the minimum wage rate. On average, 95% of my overtime hours are at my regular wage overtime rate and 5% is at the minimum wage overtime rate.

"10. On a typical week, I work 5-10 hours overtime. Mostly I am paid at the regular . . . overtime rate for the overtime hours I work.

"11. I believe that AIS pays me accurately for my overtime hours."

4. *Ernie Rosas*

In a declaration dated October 7, 2015, Rosas attested:

"1. I am a Person Leading Work . . . for [AIS]. The statements set forth herein are within my personal knowledge and, if called as a witness, I could and would competently swear to them.

"2. I have been employed by AIS for 10 years. I am an hourly employee.

"3. I usually attend about 80% of the Thursday Morning Safety Meetings. These meetings are optional.

"4. I have never seen any employees penalized or disciplined for missing a Thursday Morning Safety Meeting.

"5. I sign in on a sign in sheet when I attend the Thursday Morning Safety Meetings.

"6. At the Thursday Morning Safety Meetings, they present whatever they want to show us.

"7. I am paid continuously from the time I attend the Thursday Morning Safety Meeting until I complete my work for the day. I do not go 'off the clock' after these safety meetings.

"8. For my overtime hours, 90% are paid based on my regular wage rate and 10% is paid based on the minimum wage rate.

"9. I believe that AIS pays me accurately for my overtime hours."

5. *Robert Montoya*

In a declaration dated October 7, 2015, Robert[6] attested:

"1. I am a Supervisor for [AIS]. The statements set forth herein are within my personal knowledge and, if called as a witness, I could and would competently swear to them.

"2. I have been employed by AIS for 4 years. I am an hourly employee.

"3. The Thursday Morning Safety Meetings are optional to attend. I typically attend the Safety Meetings.

"4. I sign in on a sign in sheet when I attend the Thursday Morning Safety Meetings.

"5. The Thursday Morning Safety Meetings usually start at 5:15 am. Different topics are discussed such as . . . what's going on with the company, employee of the month is recognized, and training class updates.

"6. For the time I attend the Thursday Morning Safety Meetings, I am paid the minimum rate for attending.

"7. I am paid continuously from the time I attend the Thursday Morning Safety Meeting until I complete my work for the day. I do not go 'off the clock' after these safety meetings.

"8. I work more overtime hours at my regular wage rate than at the minimum wage rate."

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6 We refer to this declarant by his first name to distinguish him from plaintiff Montoya. No disrespect is intended.

6. *Andrew Palafox*

In a declaration dated October 7, 2015, Palafox attested:

"1. I am a Person Leading Work . . . for [AIS]. The statements set forth herein are within my personal knowledge and, if called as a witness, I could and would competently swear to them.

"2. I have been employed by AIS for 9 years. I am an hourly employee.

"3. I usually attend Thursday Morning Safety Meetings. These meetings are optional.

"4. I have never been penalized or disciplined for missing a Thursday Morning Safety Meeting.

"5. I sign in on a sign in sheet when I attend the Thursday Morning Safety Meetings so I can get paid for attending.

"6. At the Thursday Morning Safety Meetings, there are presentations and recognitions. The things that go on at the Thursday Morning Safety Meetings are different from my normal duties.

"7. I am paid continuously from the time I attend the Thursday Morning Safety Meeting until I complete my work for the day. I do not go 'off the clock' after these safety meetings.

"8. I work more overtime hours at my regular wage rate than at the minimum wage rate.

"9. I usually work 4 hours of overtime a week. Most of all my overtime hours are based on the regular wage rate.

"10. I believe that AIS pays me accurately for my overtime hours."

7. *Felix Marrufo*

In a declaration dated October 7, 2015, Marrufo attested:

"1. I am a Person Leading Work . . . for [AIS]. The statements set forth herein are within my personal knowledge and, if called as a witness, I could and would competently swear to them.

"2. I have been employed by AIS for 3 ½ years. I am an hourly employee.

"3. I usually attend about 90% of the Thursday Morning Safety Meetings because you get paid for attending.

"4. When I first worked at AIS, the [Person Leading Work] that I worked for, told me about the Thursday Morning Safety Meetings.

"5. There is no penalty or discipline against an employee who does not attend the Thursday Morning Safety Meetings.

"6. I sign in on a sign in sheet when I attend the Thursday Morning Safety Meetings.

"7. After the Thursday Morning Safety Meetings, I am paid continuously until I stop work for the day. I do not go 'off the clock' after these safety meetings.

"8. When I work overtime, 95% of the time I get paid overtime based upon my regular wage rate. The other 5% of the time, I get paid at the minimum overtime wage rate.

"9. I usually work about 5-6 hours of overtime per week.

"10. I believe that AIS pays me accurately for my overtime hours."

8. *Christy Duran*

In a declaration dated October 7, 2015, Duran attested:

"1. I am a Field Safety Technician for [AIS]. The statements set forth herein are within my personal knowledge and, if called as a witness, I could and would competently swear to them.

"2. I have been employed by AIS for almost 2 years. I am paid hourly.

"3. I usually always attend the Thursday Morning Safety Meetings because I am in the Safety Department. For other employees not in the safety department, this meeting is optional.

"4. When I first worked at AIS, Jake Farias told me about the Thursday Morning Safety Meetings.

"5. There is no penalty or discipline against an employee who does not attend the Thursday Morning Safety Meetings. [¶] . . . [¶]

"7. I am paid at the flat rate when attending the Thursday Morning Safety Meetings because I am in the Safety Dept.

"8. The Thursday Morning Safety Meetings usually start at around 5:15 am.

"9. We have a sign in sheet at the Thursday Morning Safety Meetings so AIS can pay those who attend the meeting.

"10. After the Thursday Morning Safety Meetings, I am paid continuously until I stop work for the day. I do not go 'off the clock' after these safety meetings.

"11. When I do work overtime, it is almost always at the regular wage rate. I believe that AIS pays me accurately for my overtime hours and I have never had any discrepancies."

9. *Abel Sanchez Gonzalez*

In a declaration dated October 7, 2015, Gonzalez attested:

"1. I am a field safety technician for [AIS]. The allegations set forth herein are within my personal knowledge and[,] if called as a witness, I could and would competently swear to them.

"2. I have been employed by AIS since September 2011. . . . I am an hourly paid employee.

"3. I always attend the Thursday Morning Safety Meetings because I am in the Safety Department. However, for other employees, this meeting is optional.

"4. The Safety Department sets out a sign in sheet at the Thursday Morning Safety Meetings so that all the employees who attend the meeting can be paid.

"5. There is no penalty or discipline against an employee who does not attend the Thursday Morning Safety Meetings. [¶] . . . [¶]

"7. I am paid at the regular rate when attending the Thursday Morning Safety Meetings because that is part of my regular job.

"8. The Thursday Morning Safety Meetings usually start at around 5:15 am.

"9. I usually talk about a safety topic at the Thursday Morning Safety Meetings.

"10. After the Thursday Morning Safety Meetings, I am paid continuously until I stop work for the day. I do not go 'off the clock' after these safety meetings.

"11. I believe that AIS pays me accurately for my overtime hours since I am paid for the hours that I turn in."

10. *Johnnie Smith*

In a declaration dated October 7, 2015, Smith attested:

"1. I am a Driver for [AIS]. The statements set forth herein are within my personal knowledge and, if called as a witness, I could and would competently swear to them.

"2. I have been employed by AIS for 1 year. I am an hourly employee.

"3. I usually attend all of the Thursday Morning Safety Meetings. These meetings are optional.

"4. I have never been penalized or disciplined for missing a Thursday Morning Safety Meeting[].

"5. I sign in on a sign in sheet when I attend the Thursday Morning Safety Meetings so I can get paid for attending.

"6. I get paid the minimum wage rate for attending the Thursday Morning Safety Meetings. [¶] . . . [¶]

"8. I am paid continuously from the time I attend the Thursday Morning Safety Meeting until I complete my work for the day. I do not go 'off the clock' after these safety meetings.

"9. I work more overtime hours at my regular wage rate than at the minimum wage rate.

"10. I believe that AIS pays me accurately for my overtime hours."

11. *Jessica Stumbaugh*

In a declaration dated October 7, 2015, Stumbaugh attested:

"1. I am a Lean Sigma Manager for [AIS]. The statements set forth herein are within my personal knowledge and, if called as a witness, I could and would competently swear to them.

"2. I have been employed by AIS for 10 months. I am an hourly employee.

"3. I usually attend about 50% of the Thursday Morning Safety Meetings. These meetings are optional.

"4. If I miss a Thursday Morning Safety Meeting, I do not call in[] to notify anyone at AIS since the meeting is optional.

"5. I have never been penalized or disciplined for missing a Thursday Morning Safety Meeting[]. . . .

"6. I sign in on a sign in sheet when I attend the Thursday Morning Safety Meetings so I can get paid for attending.

"7. At the Thursday Morning Safety Meetings, there are presentations and recognitions.

"8. I am paid continuously from the time I attend the Thursday Morning Safety Meeting until I complete my work for the day. I do not go 'off the clock' after these safety meetings.

"9. I believe that AIS pays me accurately for my overtime hours."

12. *Jason Harding*

In a declaration dated October 7, 2015, Harding attested:

"1. I am a Person Leading Work . . . for [AIS]. The statements set forth herein are within my personal knowledge and, if called as a witness, I could and would competently swear to them.

"2. I have been employed by AIS for 2 years. I am an hourly employee.

"3. I usually try and attend the Thursday Morning Safety Meetings unless I need to leave early for a job assignment.

"4. I have never been penalized or disciplined for missing a Thursday Morning Safety Meeting[].

"6. I sign in on a sign in sheet when I attend the Thursday Morning Safety Meetings so I can get paid for attending.[7]

"7. The Thursday Morning Safety Meetings usually start at 5:15 am and at every meeting, different topics are discussed about safety concerns.

"8. For the time I attend the Thursday Morning Safety Meetings, I am paid the minimum rate for attending.

"9. I am paid continuously from the time I attend the Thursday Morning Safety Meetings until I complete my work for the day. I do not go 'off the clock' after these safety meetings.

"10. I work more overtime hours at my regular wage rate than at the minimum wage rate. [¶] On average, 80% of my overtime hours are at my regular wage overtime rate and 20% is at the minimum wage overtime rate.

"11. I believe that AIS pays me accurately for my overtime hours."

iii. Plaintiffs' wage records

1. *Fritz*

An AIS "**EMPLOYEE EARNINGS RECORD**" for Fritz covering the period between June 1, 2011, and July 31, 2012, listed three different hourly rates: $18; $12; and $8. For each hour of overtime worked, Fritz was paid $25.50 prior to May 2012 and $27 thereafter.

2. *Macias*

An AIS "**EMPLOYEE EARNINGS RECORD**" for Macias covering the period between September 1, 2011, and October 31, 2013, listed three different hourly rates: $16; $12; and $8. Macias received $12,873 for 605 hours of overtime worked, an hourly rate of $21.28.

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7 The declaration skips from paragraph 4 to paragraph 6.

3. *Aurthur*

There were two wage statements issued by AIS to Aurthur. For the period between November 12, 2012, and November 18, 2012, Aurthur earned $723: (1) $612 for working 36 "Regular" hours at an hourly rate of $17; (2) $102 for working four "Overtime" hours at an hourly rate of $25.50; and (3) $9 for working 0.75 "Regular" hours at an hourly rate of $12. For the period between November 19, 2012, and November 25, 2012, he earned $1,043: (1) $629 for working 37 "Regular" hours at an hourly rate of $17; (2) $255 for working 10 "Overtime" hours at an hourly rate of $25.50; (3) $6 for working 0.75 "Regular" hours at an hourly rate of $8; and (4) $153 for working 4.5 "Premium Time" hours at an hourly rate of $34.

b. *Plaintiffs' opposition*

On January 5, 2018, plaintiffs filed an opposition to AIS's motion. It argued "each of the material issues which [AIS] purports is undisputed in this case is actually in dispute: Whether attendance at Thursday Morning Safety Meetings . . . was mandatory; whether employees were paid for their travel time from [AIS]'s [office] following [said meetings] to [their] respective job sites; whether employees were paid properly for their travel time; and whether employees were properly paid overtime wages."

In support of their opposition, plaintiffs presented the following evidence:

i. Deposition testimony

Kimberly Morgan, AIS's office manager, was designated as the person most knowledgeable to testify on the company's behalf. She was deposed on April 14, 2015. The transcript of the deposition read in part:

"Q. . . . . [A]re there training meetings before the shift starts?

"A. Some days.

"Q. Okay. And those are mandatory meetings; correct?

"A. If you're not working. [¶] . . . [¶]

"Q. Those are mandatory safety meetings that occur at [AIS]'s [office]; correct? [¶] . . . [¶]

"[A.] There is one safety meeting on a Thursday morning that is approximately for 30 or 45 minutes that would start before the start . . . of their job that they would report to the [office] or report to the field. [¶] . . . [¶]

"Q. And that's a mandatory meeting; correct?

"A. If they're not working.

"Q. Right. But most of them are not working at that hour before 6:00; correct?

"A. It just depends on . . . what they're working on. We have night crews that work. We have crews that work twelve-hour shifts that might not be off for the safety meeting . . . . [¶] . . . [¶] . . . If the crews are working then they obviously will not go to the safety meeting, but if they are starting their job at 6:00 in the morning in the field, they would report to the office for the five o'clock safety meeting on Thursday mornings. [¶] . . . [¶]

"Q. So everybody attending the mandatory safety meeting on Thursday is being paid at minimum wage, although their regular wage is higher?

"A. Yes."[8]

ii. Aurthur's wage records

Plaintiffs furnished the wage statement issued by AIS to Aurthur for the period between November 12, 2012, and November 18, 2012. A document already offered by AIS. They also furnished Aurthur's timesheet for that period, which indicated Aurthur

[8] Plaintiffs submitted Fritz's testimony at his January 30, 2017 deposition. That testimony addressed whether the Thursday morning meetings were mandatory. It also addressed whether the employees were paid for their subsequent ride time to the job site. On that second point, at oral argument, plaintiffs argued that Fritz stated he was not paid for the time he rode from the Thursday morning meetings to the job site. We note that the trial court sustained AIS's objection to this testimony on the basis of relevance. Plaintiffs did not challenge that ruling on appeal. (See *Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 685 [issues that are not expressly raised and supported in the opening brief are deemed waived or abandoned].)

worked 36 regular hours and four overtime hours and attended a Thursday morning meeting that lasted 45 minutes. Based on the clock-in and clock-out times registered, however, plaintiffs calculated Aurthur worked 35.25 regular hours and 4.75 overtime hours as well as attended a 45-minute Thursday morning meeting. They allege Aurthur, who received $723 during this pay period, should have received $725.04 under the proper blended rate.[9]

c. *AIS's reply*

In its reply filed on January 12, 2018, AIS maintained "there is no dispute that employee attendance at Thursday morning safety meetings is not mandatory, that employees never went off the clock on Thursdays following the non-mandatory safety meetings, that employees [were] paid continuously from the time the safety meetings began until the end of their workday, and that employees were overpaid their compensation."

In support of its reply, AIS presented the following evidence:

i. Morgan's declaration

In a declaration dated June 5, 2017, which was submitted "in support of [AIS's] opposition to [Plaintiffs'] motion for class certification" (boldface & capitalization omitted) and preceded AIS's filing of the summary judgment motion by a few months, Morgan attested:

> "7. As it pertains to safety meetings, in my deposition on April 14, 2015, there was testimony regarding AIS'[s] safety meetings which occur at the job sites, away from the office on the oil leases, and regarding the Thursday morning Safety Meetings at AIS'[s] office.
>
> "8. I know that the onsite safety meetings at the oil leases are mandatory for all employees. This is where the Supervisors and Foremen

[9] Plaintiffs submitted a wage statement issued by Continental to Thompson for the week ending September 15, 2012. The court sustained AIS's objection to this document on the basis of relevance.

explain the work to be performed and the associated safety rules and regulations to make sure that the job is performed properly and safely.

"9. In reference to the Thursday morning Safety Meetings, as AIS'[s] Office Manager, I do not have personal knowledge of those meetings, and I am not the person most knowledgeable regarding those Safety Meetings. I have never attended one of those Thursday morning meetings which I am informed start around 5:15 a.m. at our office.

"10. AIS'[s] Safety Manager, Jacob Farias conducts those Thursday morning Safety Meetings, and he is supervised by the President of AIS, Leslie Knox. All inquiries regarding the Thursday Safety Meetings should be directed to those individuals and others in the Safety Department."

On the basis of this declaration, AIS argued:

"Plaintiffs and the Court may not rely on Ms. Morgan's deposition testimony on the matter of the Thursday morning safety meetings, because her testimony on this matter is not admissible at trial. Ms. Morgan's deposition testimony on this matter is not admissible at trial, because she lacks personal knowledge on the topic of Thursday morning safety meetings and she lacked such knowledge when she testified about the meetings during her deposition."

ii. Deposition testimonies

During Knox's April 14, 2015 deposition, the following exchange occurred:

"Q. Do you know Kim Morgan?

"A. Yeah.

"Q. If she testified this morning that . . . those Thursday safety meetings attendance was mandatory, was she just incorrect?

"A. She has never been to one, to my knowledge. I mean, if she has, it was to get a timecard signed.

"Q. So you disagree with her on that point? [¶] . . . [¶]

"A. I don't know why she would say that they're mandatory when they're not."

At depositions conducted on December 19, 2017, and December 20, 2017, AIS employees Duran, Gonzalez, Hale, Marrufo, Uresti, and Ernest Davison each testified attendance at the Thursday morning meetings was not mandatory.

d. *Ruling*

Motion hearings were held on January 19, 2018, and February 16, 2018. On March 26, 2018, the superior court granted AIS's summary judgment motion. It reasoned:

> "The disposition of this motion and this Class Action litigation hinges upon whether certain 'Thursday morning' safety meetings held by [AIS] at its [office] for employees were 'mandatory.' Plaintiffs allege that the meetings were mandatory. [AIS] denies that the meetings were mandatory. . . . Plaintiffs contend as a class that they were not paid all wages due in that they (as non-drivers) were not paid for travel to their worksite after attending the Thursday meetings, and that, since the meetings were mandatory, their travel time was compensable. [AIS] claims that wages were not required to be paid since the meetings were not mandatory, but that, in any case, the employees were paid. Plaintiffs dispute both that all were paid or that they were paid a proper rate. [¶] . . . [¶]
>
> "Here, [AIS] has met its summary judgment burden by its evidence that the Thursday morning meetings were not mandatory . . . . From this essential fact [AIS] argues that it is entitled to summary judgment. If this fact is established to a summary judgment standard, then [AIS] argues that all other disputed facts become immaterial.
>
> "Plaintiffs offer excerpts from the deposition of . . . Morgan, [AIS]'s office manager and designated Person Most Knowledgeable or Qualified at the deposition, to establish by her admission that the Thursday morning meetings were mandatory. . . .
>
> "[AIS] objects to the deposition excerpts of . . . Morgan on the grounds that the testimony lacks foundation. In support of its objection, [AIS] offers a previous declaration of Morgan dated June 5, 2017 disclaiming personal knowledge of the Thursday safety meetings. The declaration was not offered for the first time in summary judgment, but pre-dated the summary judgment motion by months. [AIS] also offers the deposition testimony of . . . Knox, to the effect that Morgan has no

knowledge of the meetings, thereby disclaiming Morgan's personal knowledge.

"The issue presented is whether [AIS] can object to the testimony of its own [Person Most Knowledgeable] on the grounds of lack of foundation, and whether [AIS] may contradict prior deposition testimony of its [Person Most Knowledgeable] in support of granting summary judgment.

"Summary judgment requires that the evidence provided in declarations or discovery be admissible at trial. [Citation.] [AIS] does not offer Morgan's testimony. Plaintiff[s] offer[] Morgan's testimony. A party may object to the foundation of personal knowledge of any witness. [AIS] is not offering Morgan's declaration to impeach her testimony by a contrary assertion. [AIS] is objecting to its foundation. Even though Morgan was a [Persons Most Knowledgeable], her testimony does not have the same binding effect as a response to a Request for Admissions. [Person Most Knowledgeable]'s may be confronted with some questions that are unexpected, even after the designation of categories of questions contemplated by the discovery statutes. The 'lack of personal knowledge' objection is not to the form of the question, and is therefore preserved.

"Generally speaking, concessions or admissions made during the course of discovery control over contrary affidavits or declarations filed in connection with a motion for summary judgment. The issue is most frequently confronted when a party opposes summary judgment with a contrary declaration. . . . [¶] . . . [¶]

"The true issue before the court in light of the objection made is whether Morgan's testimony would be admissible at trial over the objection, creating an issue of her credibility or an issue upon a material fact that would need to be determined by the court or jury as a trier of fact. Presumably at trial her testimony would be offered in an Evidence Code section 776 examination. [AIS] would object. The court would likely conduct a[n Evidence Code] section 402 hearing upon the foundational fact. Morgan has disclaimed personal knowledge that the meetings were mandatory. Plaintiff[s] offer[] no other admissible evidence that they were. Based upon the objection and evidence offered regarding the lack of personal knowledge, the court would sustain the objection. [¶] . . . [¶]

"Once the court has determined that there is no triable issue of material fact over the question of the non-mandatory nature of the Thursday safety meetings, the issue remains if there are any other triable issues.

"If the Thursday meetings are not mandatory, then any dispute of material fact over whether employees were paid for their 'drive time' after the meetings may be moot. [AIS] claims that its evidence establishes that employees were paid for that time. Even if some were not, the voluntary safety meetings were neither required nor the employees' principal activities such that their 'drive time' was compensable. Nevertheless, the court finds that [AIS] has met its burden that this 'drive time' was compensated. The evidence in opposition to this point is insufficient to meet Plaintiffs' burden to raise a triable issue.

"The princip[al] issue raised by Plaintiffs on the point of whether there remains a triable issue if the Thursday meetings are deemed voluntary is that, whether voluntary or not, the meetings began the employees' workday, typically resulting in overtime, and that there is a triable issue that [AIS] failed to pay a proper blended rate for overtime, because the time at safety meetings was calculated at a minimum rate, and the minimum rate was used to calculate overtime rather than at a rate blended for the pay period based upon the employees' higher wage rates.

"[AIS]'s motion meets its burden to establish that the majority of employees' overtime hours were paid at their higher wage rate. If the weighted average rate advocated by Plaintiffs was applied to the employees' work hours during the week, [AIS]'s evidence establishes that [AIS] actually paid employees in excess of this 'weighted average' minimum, and [AIS] have proven to a summary judgment standard that Plaintiffs have suffered no damages. . . . [¶] . . . [¶]

"[Plaintiffs counter this evidence] with a single wage statement of Aurthur which demonstrates that, if Aurthur had been paid under Plaintiffs' blended rate theory, he was underpaid for the period by $2.04. Does this proof by Plaintiffs establish that there is a triable material fact upon the issue?

"It does not. To be material for summary judgment purposes, the fact must be essential to judgment, that is, if proved, it would change the outcome of the case. Here, although counsel argues that the Aurthur wage statement is exemplary, there is no competent evidence that it is exemplary sufficient to overcome [AIS]'s evidence. In other words, if plaintiff[s] offered evidence that the deficient wage statement was of a type that predominated for the Plaintiffs or for the class, there might be a material issue. A deficiency of $2.04 per week for all employees over the period in question might be material, but there is no such evidence. The court is left with proof of a $2.04 deficiency for Aurthur under Plaintiffs' blended rate

theory, which is insufficient to overcome [AIS]'s evidence . . . . The triable fact posited is *de mini*[*mi*]s and therefore immaterial."

DISCUSSION

I. Overview of summary judgment law

Summary judgment "provide[s] courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) "[Code of Civil Procedure] section 437c was significantly changed when amendments in 1992 and 1993 brought it closer to its federal counterpart, 'in order to liberalize the granting of [summary judgment] motions.' " (*Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 542 (*Perry*), quoting *Aguilar*, *supra*, at p. 848.) "Summary judgment is now seen as 'a particularly suitable means to test the sufficiency' of the plaintiff's or defendant's case. [Citations.]" (*Perry*, *supra*, at p. 542.)

A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining if the papers show that there is no triable issue as to any material fact, the court shall consider all of the evidence set forth in the papers, except the evidence to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence if contradicted by other inferences or evidence that raise a triable issue as to any material fact." (Code Civ. Proc., § 437c, subd. (c).)

A defendant seeking summary judgment bears an initial burden to produce evidence demonstrating either one or more elements of the cause of action cannot be established or there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, *supra*, 25 Cal.4th at pp. 849-850, 854-855.) If the motion is made against a plaintiff who would bear the burden of proof by a preponderance of

evidence at trial, the defendant "must present evidence that would require a reasonable trier of fact not to find any underlying material fact more likely than not—otherwise, he would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact." (*Aguilar*, *supra*, at p. 851, italics & fn. omitted.) If the defendant makes a prima facie showing, then the burden of production "shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(2).) "The plaintiff . . . shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto." (*Ibid*.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra,* at p. 850, fn. omitted.)

"[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion[**10**] that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar, supra,* 25 Cal.4th at p. 850, fn. omitted.)

II. Analysis

a. *Sustention of AIS's objection to Morgan's deposition testimony*

In general, "we review the trial court's final rulings on evidentiary objections by applying an abuse of discretion standard." (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 122; see *Alexander v. Scripps Memorial Hospital La Jolla* (2018) 23 Cal.App.5th 206, 226 [weight of authority holds appellate courts review rulings on evidentiary

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10 Whereas a burden of production entails only the presentation of evidence, a burden of persuasion entails the establishment of a requisite degree of belief by way of such evidence. (*Aguilar*, *supra*, 25 Cal.4th at p. 850.)

objections made in connection with summary judgment motion for abuse of discretion]; *Howard Entertainment, Inc. v. Kudrow* (2012) 208 Cal.App.4th 1102, 1122-1123 (conc. opn. of Turner, P.J.) [same].) "[E]videntiary objections based on lack of foundation, qualification of experts, and conclusory and speculative testimony are traditionally left to the sound discretion of the trial court." (*Alexander v. Scripps Memorial Hospital La Jolla*, *supra*, at p. 226.) "As the parties challenging the court's decision, it is plaintiffs' burden to establish such abuse, which we will find only if the trial court's order exceeds the bounds of reason." (*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 679.)

"[Code of Civil Procedure] section 437c has always required the evidence relied on in supporting or opposing papers to be admissible." (*Perry, supra*, 2 Cal.5th at p. 542, italics omitted; see *Hayman v. Block* (1986) 176 Cal.App.3d 629, 638 ["The motion [for summary judgment] must be decided upon admissible evidence in the form of affidavits, declarations, admissions, answers to interrogatories, depositions and matters of which judicial notice shall or may be taken."].) Here, plaintiffs offered Morgan's deposition testimony on April 14, 2015, to prove employee attendance at AIS's Thursday morning meetings was mandatory. AIS objected to this testimony, providing a declaration dated June 5, 2017, in which Morgan attested she "d[id] not have personal knowledge of those meetings," "[was] not the person most knowledgeable regarding those . . . [m]eetings," and "never attended one of those . . . meetings."[11] In view of this declaration, the superior court found Morgan's deposition testimony inadmissible and sustained AIS's objection. (See Evid. Code, § 702 ["[T]he testimony of a witness concerning a particular

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11 At oral argument, plaintiffs cited to *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308 and asserted Morgan's declaration was not offered by AIS in the trial court until their reply brief and, therefore, the court should not have considered it. Plaintiffs did not raise this point in their briefing on appeal. Again, issues that are not expressly raised and supported in the opening brief are deemed waived or abandoned. (*Paulus v. Bob Lynch Ford, Inc.*, *supra*, 139 Cal.App.4th at p. 685.)

matter is inadmissible unless he [or she] has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter."].)

The court recognized the general rule that "concessions or admissions made during the course of discovery control over contrary affidavits or declarations filed in connection with a motion for summary judgment." (See *Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 459-460 ["[A] party may not defeat summary judgment by means of declarations or affidavits which contradict that party's deposition testimony or sworn discovery responses."].) As pointed out by the court, however: (1) Morgan's deposition testimony "d[id] not have the same binding effect as a response to a Request for Admissions" because, even though Morgan was designated as the person most knowledgeable to testify on AIS's behalf, she "may be confronted with some questions that are unexpected, even after the designation of categories of questions contemplated by the discovery statutes" (cf. *Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1522 ["[Deposition answers] do not constitute incontrovertible judicial admissions as do, for example, concessions in a pleading [citation], or answers to requests for admissions, which are specially designed to pare down disputed issues in a lawsuit."]); (2) Morgan's declaration "was not offered for the first time in summary judgment, but pre-dated the summary judgment motion by months"; and (3) AIS "[did] not offer[] Morgan's declaration to impeach her testimony by a contrary assertion." Instead, "[t]he true issue before the court in light of [AIS's] objection made [wa]s whether Morgan's testimony would be admissible at trial over the objection."

We conclude the superior court's ruling did not exceed the bounds of reason.

b. *Existence of triable issues of material fact*

"[A]s the reviewing court, we determine de novo whether an issue of material fact exists and whether the moving party was entitled to summary judgment as a matter of law. [Citation.] In other words, we must assume the role of the trial court and reassess

the merits of the motion. [Citation.] In doing so, we will consider only the facts properly before the trial court at the time it ruled on the motion. [Citation.]" (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1601.) "We apply the same three-step analysis required of the trial court. First, we identify the issues framed by the pleadings since it is these allegations to which the motion must respond. Second, we determine whether the moving party's showing has established facts which negate the opponent's claim and justify a judgment in the moving party's favor. When a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable issue of material fact." (*Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493-494.)

Plaintiffs contend "there remained triable issues of fact" "[i]rrespective of Morgan's testimony." (Boldface omitted.) Specifically, (1) "[w]hether non-drivers should have been compensated for their drive time was still a triable issue"; and (2) "[t]he trial court misapplied the de minimis doctrine." (Boldface omitted.)

i. Drive-time compensation

Plaintiffs assert non-drivers who rode from the Thursday morning meetings to their respective job sites must be compensated and cite to *Burnside v. Kiewit Pacific Corp.* (9th Cir. 2007) 491 F.3d 1053 (employees' claims, brought under state law, are not preempted by § 301 of the Labor Management Relations Act (29 U.S.C.S. § 185(a)), and California state law recognizes an employee's right to be compensated for time spent traveling from a designated meeting point to the jobsite when the employer requires this travel). Plaintiffs reason that their evidence showed the Thursday morning safety meetings were mandatory and related to the employees' job duties.

AIS concedes employer-mandated travel time is compensable under *Burnside* but argue that, since attendance at the Thursday morning safety meetings was not mandatory, the travel from those meetings was not compensable. AIS cites to *Rutti v. Lojack Corp.* (9th Cir. 2010) 596 F.3d 1046, in which the Ninth Circuit referenced its holding in

Lindow v. U.S. (9th Cir. 1984) 738 F.2d 1057 that held "pre-shift activities are compensable if they are an 'integral and indispensable part of the principal activities for which covered workmen are employed,' [citation] . . . ." (*Ruttie, supra,* at p. 1055.) "The test . . . to determine which activities are 'principal' and which are 'an integral and indispensable part' of such activities, is not whether the activities in question are uniquely related to the predominant activity of the business, but whether they are performed as part of the regular work of the employees in the ordinary course of business." (*Ibid*.) Plaintiffs, in their reply brief, do not challenge AIS's reliance on *Rutti*.

AIS asserts the Thursday morning safety meetings were "not . . . part of the regular work of AIS'[s] employees in the ordinary course of business." The business involved cleaning tanks; the meetings involved employee recognition. Regardless, AIS compensated the employees who attended the meetings for their drive time as those employees did not "go off the clock" after the meetings.

"All employer-mandated travel that occurs after the first location where the employee's presence is *required* by the employer shall be compensated at the employee's regular rate of pay . . . ." (Cal. Code Regs., tit. 8, § 11160, subd. 5(A), italics added.)

AIS provided the deposition testimonies and declarations of Knox and various AIS employees to prove attendance at the Thursday morning safety meetings was optional and the activities at said meetings—e.g., presentations and discussions about job safety, recognition given to certain employees, distribution of corporate apparel, announcements and updates—were not part of non-safety employees' regular work in the ordinary course of business. (See *ante*, at p. 2.) These deposition testimonies and declarations were also provided to prove employees that attended a Thursday morning safety meeting were not taken off the clock after the meeting ended and while they traveled from the office to their worksite.

Plaintiffs relied on either evidence that was not admitted (see fn. 8, *ante*), inadmissible evidence (see *Perry, supra,* 2 Cal.5th at p. 543 ["A party may not raise a

triable issue of fact at summary judgment by relying on evidence that will not be admissible at trial."]), or evidence insufficient to allow a reasonable trier of fact to find the Thursday morning safety meetings were mandatory and/or involved integral and indispensable components of plaintiffs' principal activities.

Hence, on this matter, plaintiffs did not provide evidence demonstrating the existence of a triable issue of material fact.

ii. De minimis doctrine

Plaintiffs alleged AIS did not pay the proper amount of overtime compensation to employees who attended the Thursday morning safety meetings, i.e., the company utilized "[the] meeting's lower $8 rate" rather than "the weighted average of all hours worked," resulting in "substantial underpaid overtime." (See 29 C.F.R. § 778.115 (2008) ["Where an employee in a single workweek works at two or more different types of work for which different nonovertime rates of pay (of not less than the applicable minimum wage) have been established, his regular rate for that week is the weighted average of such rates."].) In support of its summary judgment motion, AIS provided declarations from numerous employees who attested their overtime pay was chiefly based on their regular wage rates and occasionally based on the minimum wage rate. Wage records provided by AIS demonstrated Fritz, Macias, and Aurthur were paid well above $12 for each hour of overtime worked. In their opposition, plaintiffs provided Aurthur's wage statement and timesheet for the period between November 12, 2012, and November 18, 2012, as proof Aurthur was entitled to an additional $2.04 had his overtime pay been based on the "weighted average" rate. The superior court concluded AIS established "the majority of employees' overtime hours were paid at their higher wage rate," which was "in excess of th[e] 'weighted average' minimum," and "prove[d] to a summary judgment standard that Plaintiffs have suffered no damages." It considered "*de mini*[*mi*]s" and immaterial Aurthur's purported underpayment.

On appeal, plaintiffs assert the court "misappl[ied] . . . the de minimis doctrine" with respect to the underpayment. " 'The function of the "de minimis" doctrine . . . is to place "outside the scope of legal relief the sorts of intangible injuries, normally small and invariably difficult to measure, that must be accepted as the price of living in society." The maxim signifies "that mere trifles and technicalities must yield to practical common sense and substantial justice" so as "to prevent expensive and mischievous litigation, which can result in no real benefit to complainant, but which may occasion delay and injury to other suitors." ' [Citation.]" (*Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 842-843.) Recently, our Supreme Court observed:

> "[T]he modern availability of class action lawsuits undermines to some extent the rationale behind a de minimis rule with respect to wage and hour actions. The very premise of such suits is that small individual recoveries worthy of neither the plaintiff's nor the court's time can be aggregated to vindicate an important public policy." (*Troester v. Starbucks Corp.*, *supra*, 5 Cal.5th at p. 846.)

Assuming, arguendo, the court should not have invoked the de minimis doctrine, the $2.04 deficiency remained immaterial. "A fact is material when, under the governing substantive law, it could affect the outcome of the case." (*Wi-LAN Inc. v. LG Electronics, Inc.* (S.D.Cal. 2019) 421 F.Supp.3d 911, 920, citing *Anderson v. Liberty Lobby, Inc.* (1986) 477 U.S. 242, 248.) The record shows Aurthur worked at AIS for 12 days. As noted by the court, plaintiffs could only demonstrate AIS underpaid Aurthur $2.04 during a single pay period. They did not offer any evidence "[Authur's] deficient wage statement was of a type that predominated for the Plaintiffs or for the class." Thus, plaintiffs' evidence could not establish the existence of a triable issue of material fact.

DISPOSITION

The judgment of the superior court entered on an order granting summary judgment is affirmed. Costs on appeal are awarded to defendant C.L. Knox, Inc.

DETJEN, Acting P.J.

WE CONCUR:

SMITH, J.

MEEHAN, J.